Re Arif bin Sionggong, ex p Arab Malaysian Finance Bhd

HIGH COURT (KOTA KINABALU) — BANKRUPTCY PETITION NO K29(P)–2 OF 1994
TEE AH SING JC
15 JUNE 1995

Bankruptcy *— Act of bankruptcy — Date of commission — Misstatement of date of commission in bankruptcy petition — Whether mere irregularity — Whether judge can exercise discretion to remedy — Bankruptcy Act 1967 s 131*

The bankruptcy petition brought against the debtor stated that the debtor had committed an act of bankruptcy on 22 November 1993 due to the failure to comply with the requirements of the bankruptcy notice on 15 November 1993. The Official Assignee, however, claimed that the act of bankruptcy was only committed on 23 November 1993. The petitioner submitted that the error in stating the date was due to a miscalculation and urged the court to exercise its discretion under s 131 of the Bankruptcy Act 1967 ('the Act').

Held, allowing the petition:

An act of bankruptcy is complete at the last moment of the last day prescribed for payment of the debt, excluding the day of service. Therefore, the allegation that the act of bankruptcy was committed on 22 November 1993 was incorrect as it took place only after midnight of that day. However, the misstatement was merely an irregularity or formal defect and was remediable under s 131 of the Act as no substantial injustice has been caused by it.

[**Bahasa Malaysia summary**

Petisyen kebankrapan yang dibawa terhadap penghutang menyatakan bahawa penghutang telah melakukan suatu perbuatan kebankrapan pada 22 November 1993 kerana kegagalannya untuk mematuhi keperluan notis kebankrapan yang disampaikan pada 15 November 1993. Pegawai Pemegang Harta bagaimanapun menegaskan bahawa perbuatan kebankrapan hanya dilakukan pada 23 November 1993. Pempetisyen mengaku bahawa pihaknya telah melakukan kesilapan dalam menyatakan tarikh itu kerana kesalahan dalam pengiraan dan menggesa mahkamah untuk menggunakan budi bicaranya di bawah s 131 Akta Kebankrapan 1967 ('Akta itu').

Diputuskan, membenarkan petisyen itu:

Sesuatu perbuatan kebankrapan terlaksana pada masa terakhir pada hari terakhir yang ditetapkan untuk pembayaran hutang itu, tidak termasuk hari penyampaian. Oleh yang demikian, pengataan bahawa

perbuatan kebankrapan berlaku pada 22 November 1993 tidaklah benar kerana ianya hanya berlaku selepas tengah malam pada hari itu. Walau bagaimanpun, kenyataan yang salah itu hanyalah suatu luar aturan ataupun kecacatan formal dan boleh diremedikan di bawah s 131 Akta itu kerana tiada ketidakadilan besar yang diakibatkan olehnya.

Notes

For cases on acts of bankruptcy, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1242–1261.

Cases referred to

Fadzil bin Othman Re, ex p Malayan Banking Bhd [1994] 2 MLJ 474 (not folld)

Maud Re, ex p Townend [1891–4] All ER Rep Ext 2054 (refd)

Legislation referred to

Bankruptcy Act 1967 s 131

Feona Jinu (*Jayasuriya Kah & Co*) for the petitioning creditor.
Shamshuzaman bin Hj Sulaiman for the Official Assignee.
Debtor in person.

Cur Adv Vult

Tee Ah Sing JC: In this bankruptcy petition, in para 4 it is averred that the debtor within six months before the date of the presentation of the petition has committed an act of bankruptcy, namely, that the debtor failed before 22 November 1993 to comply with the requirements of a bankruptcy notice duly served on the debtor on 15 November 1993 by way of personal service.

The representative from the Official Assignee drew the attention of the court that on 22 November 1993 the debtor did not commit an act of bankruptcy but the act of bankruptcy was only committed on 23 November 1993.

The learned counsel for the petitioning creditor submitted that the error in stating the date was due to a miscalculation and urged the court to exercise its discretion under s 131 of the Bankruptcy Act 1967 ('the Act').

In *Re Fadzil bin Othman, ex p Malayan Banking Bhd* [1994] 2 MLJ 474, Richard Talalla J at p 475 said:

> In this bankruptcy petition it is stated that the act of bankruptcy was committed on 15 June 1992, the bankruptcy notice having been served on 8 June 1992. The representative of the Official Assignee drew the court's attention to the incorrectness of that statement, saying that by reference to s 3(1)(i) of the Bankruptcy Act 1967, a debtor commits an act of bankruptcy if he does not within seven days after service of the bankruptcy notice either

> comply with the requirements of the notice or satisfy the court that he has a counterclaim, set-off or cross-demand.

And later on in the same page his Lordship said:

> I find the petition is incorrect. Any act of bankruptcy had necessarily to take place on 16 June 1992. The petition is dismissed.

With great respect I decline to follow the decision of this case. My reasons are as follows.

Section 131 of the Act provides as follows:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

In the instant case, excluding the day on which service of the bankruptcy notice was effected, payment of the debt should have been made before midnight of 22 November 1993 which date according to the calendar was a Monday and a working day.

It is clear that the allegation of fact in para 4 of the bankruptcy petition that the act of bankruptcy was committed on 22 November 1993 was not quite correct as it took place only after midnight of that day after which the seven-day period would lapse.

An act of bankruptcy is complete at the last moment of the last day (excluding the day of service) prescribed for compliance (see *Williams on Bankruptcy* (18th Ed) at p 42 and the case of *Re Maud, ex p Townend* [1891–4] All ER Rep Ext 2054).

Further, there was no evidence that the debtor attempted to pay up the sum claimed at any time before midnight of 22 November 1993. In the instant case, the act of bankruptcy was in fact complete at the last moment of 22 November 1993.

I am of the considered opinion that the misstatement was merely a formal defect or irregularity and not in substance which was remediable under s 131 of the Act as no substantial injustice has been caused by it.

In view of the foregoing, I accordingly make a receiving and adjudication order against the debtor.

Petition allowed.

Reported by Azra Azman